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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1992

John C. Pritchard,

Petitioner,

v.

National Transportation Safety Board, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Administrator of the Federal Aviation Administration may suspend an airman's pilot certificate on the basis of an inference of *pilot error,* admittedly concluded without investigation, or as required by the provisions of the Federal Aviation Act (49 U.S.C. Section 609(a)), and in violation of the *Due Process* principles which the Court established in *Accardi v. Shaughnessy* (347 U.S. 260 (1953)).

2. Whether the Court of Appeals erred in sustaining an inference of pilot carelessness, concluded without investigation, by equating such presumption to permissable state of mind inferences drawn in murder cases where a deadly weapon is used.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner John C. Pritchard requests that the Court issue a writ of certiorari to review a Memorandum of the United States Court of Appeals for the Ninth Circuit, issued on July 15, 1992, wherein the court of appeals affirmed a National Transportation Safety Board Order which sustained the suspension of Captain Pritchard's Airline Transport Pilot certificate.

OPINIONS BELOW

The Opinion and Order of the National Transportation Safety Board in the underlying case is reported in a 'Slip Opinion' as EA-3024 (App. B). The Memorandum of the United States Court of Appeals for the Ninth Circuit, affirming the Board's Order, is unreported (App. A). The Order of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's Motion for Rehearing, is unreported (App. E). The appeals court docket number is 90-70041.

JURISDICTION

The Memorandum of the Court of Appeals affirming the Board's Order in this case was entered on July 15, 1992. (App A). The order of the Court of Appeals denying reconsideration was entered on September 14, 1992 (App. E). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) as is provided for within the Federal Aviation Act (49 U.S.C. Section 1486(f)).

STATUTES INVOLVED

This petition concerns the proper application of Section 609(a) of the Federal Aviation Act of 1958 (49 U.S.C. Section 1429(a)) in light its mandate that the Administrator[1] of the Federal Aviation Administration "investigate" prior to making any determination to suspend a pilot's airman certificate. Where the FAA Administrator has established written standards and policies for the conduct of his "investigations" (App. F), the principles of *Administrative Due Process,* as provided for under the terms of the 5th and 14th Amendments to the U.S. Constitution, require that the FAA Administrator adhere to such investigative policies and conduct a proper investigation before making his adverse determinations which affect an individual's rights. In this case, however, the FAA admitted that it simply presumed that pilot carelessness was the cause of an aircraft incident rather than to investigate in fulfillment of the statutory requirements. Further, the FAA ignored compliance with it's own written policies. The applicable statute and policies are fully set forth and presented in the appendices (App. F and G).

STATEMENT OF THE CASE

The petitioner asks that the Court exercise its power of supervision due to the wide departure of the Appeals Court from the accepted course of judicial proceedings and from the applicable

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1 Section 6(c) of the Department of Transportation Act (Public Law 89-670, approved October 15, 1966, 80 Stat. 931) effective April 1, 1967, transferred the powers and duties of the Administrator of the FAA to the Secretary of Transportation.

decisions of the Court (S.Ct. Rule 10.1(a)). In *Accardi v. Shaughnessy* (347 U.S. 260, 268 (1954)), the Court stated that a federal administrative agency has a *Due Process* obligation to fulfill the requirements of its own written policies,[2] whether or not such policies are mandated by statute. However, here the statute itself also required investigation prior to action. The Administrator, the Board, and the Court of Appeals ignored these requirements.

In Captain Pritchard's case, even though a complete, fair, and unbiased investigation was required by both the underlying statute and the written policies of the two responsible federal agencies, the Appeals Court allowed an inference of pilot carelessness to stand in spite of the FAA's admitted failure to investigate beyond establishing that an incident had occurred. The FAA was allowed to ignore its own policies, promulgated in the public's interests and in the interests of air safety, that its investigation include an unbiased gathering of all the facts, including any special, mitigating, or potentially exculpatory information.

In this case, in asserting a presumption of pilot carelessness, the FAA was allowed to completely ignore an admitted airport design deficiency, at the very heart of the case, for which Captain Pritchard had not received any warning or notice, and for which the record showed he would

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2 In this case, the FAA admittedly failed to investigate its charges in accordance with either the intent of the statute or in compliance with FAA Order 2150.3, the FAA's *'Compliance and Enforcement Program'*, dated 5/16/80 (Excerpts in App. F).

have been required to take extraordinary actions to surmount. The FAA was allowed to presume pilot carelessness without inquiry into any of the associated facts or circumstances, and justified solely on the testimony of Captain Pritchard's expert that, under some circumstances, Captain Pritchard may have been able to safely prevail over the hazard he faced.

The underlying facts of the case are simple and undisputed. After landing his widebody, air carrier aircraft at the Kansas City International Airport, Captain John Pritchard was instructed by an FAA ground controller to taxi to his assigned gate. The FAA controller provided no other warnings or information. However, a written advisory had been provided to Captain Pritchard before his flight which put him on notice that the normal route by which Pritchard would have proceeded to his gate had been closed due to an airport construction project. Pritchard thus elected to proceed to his gate via an alternate route which he concluded would pose the least difficulty.

During the course of an obtuse turn from one taxiway to another, the right main wheel of Captain Pritchard's aircraft left the taxiway and imbedded in mud at the base of a taxiway light. Captain Pritchard immediately stopped the aircraft and had it towed to the gate by ground crews. There was no damage suffered by the aircraft. However, the blue taxiway light was broken. Captain Pritchard's expert later discovered that the intersection where Pritchard attempted his turn did not meet the applicable FAA dimensional design standards, and that the point where the wheel of Captain Pritchard's aircraft came to rest in the mud was required, under FAA standards, to have been covered with concrete in order for Pritchard's

aircraft to have accomplished its turn using normal techniques and procedures.

It was undisputed that the taxiway intersection did not meet the FAA's design standards and that Captain Pritchard did not have any information which would have alerted him to the hazard which he faced, given the standard that FAA airport certification requires that each part of an airport be suitable for the most demanding aircraft for which it has been certificated to serve.[3] Nonetheless, on the basis of the end result, the FAA concluded Captain Pritchard to have been careless in violation of the Federal Aviation Regulations. The NTSB ratified this surmise with its own order affirming Captain Pritchard's license suspension irrespective of the FAA's failure to investigate either the taxiway intersection or the role which the dimensional deficiency may have played.

The Court of Appeals affirmed the NTSB Order without regard to the fact that the FAA Administrator simply inferred pilot *carelessness* based on the result rather than on the basis of an investigation conducted in accordance with the FAA Administrator's own written policies. Further, the FAA failed to accomplished its

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3 Under FAA standards, portions of airports are not always suited for all aircraft for which the airport has been certificated. In these cases, where a particular part of an airport may not be suited to normal operations by a certain size or category of aircraft, notices are circulated providing information on the restrictions or warning of the hazards. (Cf. *Peavey v. City of Miami*, 1 So.2d. 614, 617 (1941); *Mills v. Orcas Power & Light*, 355 P.2d. 781, 784 (1960)).

'investigation' within the meaning that Congress had intended under the governing statute (49 U.S.C. Section 1429(a)). FAA inspectors charged with the investigation of the taxiway incident repeatedly admitted that they had failed to conduct any investigation or inquiry beyond the fact that the taxiway incident had occurred. They did not examine, evaluate, or even consider the role which the dimensional taxiway design deficiency may have played in the incident. Further, FAA counsel did not even consider or evaluate the deficiency after its existence was brought up in interrogatories and requests to admit fact. The questions were not answered and the factual assertions were ignored. The FAA Administrator failed to undertake any further investigation or evaluation of the taxiway deficiency in spite of the requirements of his own regulations (14 C.F.R. § 13.1(b)).

Although the law judge at the underlying hearing concluded that Captain Pritchard had essentially been careful before, during, and after his attempted turn, and that "if Captain Pritchard had to go off that pavement, he did it in as safe a manner as could be done" (App. C; TR at 193), she was constrained under the terms of the Board's *Lindstam Doctrine*[4] to find Captain Pritchard guilty of carelessness in violation of the cited regulation.[5]

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4 *Administrator v. Lindstam*, 41 C.A.B 841 (1964).

5 The law judge capsulized *Lindstam* (App. C):

> "...once the government establishes a certain incident, and there is no forthcoming evidence to explain how that incident occurred, we have to find that there is negligence or carelessness involved."

The full NTSB ratified this conclusion, again ignoring the admitted taxiway design deficiency but referencing the conclusion of Pritchard's expert that a widebody L-1011 aircraft could safely complete the turn under some circumstances (App. B). The Board concluded that, whether or not the FAA conducted any investigation beyond establishing that an incident had occurred, the fact that a maneuver might have been accomplished safely, regardless of the difficulty or lack of warning, proved the FAA's surmise that Captain Pritchard was guilty of carelessness for not accomplishing it without incident.

The facts show that the FAA Administrator ignored the specific requirements of his own rules and policies.[6] Further, the FAA's inference of pilot carelessness met neither the standards which the Board had previously established for such inferences[7] nor was it accomplished with regard to

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6 The Federal Aviation Regulations (14 C.F.R. § 13.19(b)) mirror the statutory requirement that the suspension of an airman's certificate be preceded by a complete investigation. Paragraph 203(b) of FAA Order 2150.3 (App. F) states that this required investigation shall be a complete, fair, and impartial gathering of all facts, including those "which tend to undermine an allegation".

7 In *Administrator v. Davis and Manecke* (1 NTSB 1514, 1520 (1972)) the Board established that an inference of pilot carelessness is established when all other reasonable explanations have been eliminated. In *Administrator v. Hibbard* (1 NTSB 1152, 1154 (1971)) the Board concluded that an inference of pilot carelessness is rebutted when it was shown that the FAA failed to investigate a pilot's explanation of the cause of an incident.

the standards which the Court has previously set forth. In allowing the FAA Administrator's inference of pilot carelessness to stand without an investigation, meeting the FAA Administrator's own standards, both the Board (NTSB) and the Court of Appeals violated the *'Due Process'* doctrine established by the Court in numerous other cases. [8] Further, in comparing the present case to *Dickey v. Lewis* (859 F.2d. 1365 (9th Cir. 1988), the Court of Appeals erroneously equated an inference of pilot carelessness to *state of mind* inferences when a deadly weapon is used in a murder. *State of mind* can only be evaluated on the basis of the circumstances and the result. Hard evidence was available for investigation and evaluation in Pritchard's case which was not examined when both the statute and written policies required it.

BACKGROUND

In the underlying case, on September 16, 1987 the Administrator of the Federal Aviation Administration issued an Order of Suspension (App. D) which suspended the Airline Transport Pilot certificate of Petitioner John C. Pritchard. The FAA Administrator alleged that Captain Pritchard had been careless in the operation of his widebody air carrier aircraft for having allowed the right main wheel of the aircraft to depart a taxiway while making a turn from one taxiway to another.

As is allowed within the provisions of Section

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[8] *Accardi v. Shaughnessy*, (supra); *Service v. Dulles* (354 U.S. 363, 388 (1957)); *Vitarelli v. Seaton* (359 U.S. 535, 547 (1959)); *Yellin v. United States* (374 U.S. 109, 121 (1963)).

609 of the Federal Aviation Act (49 U.S.C. § 1429(a)), Pritchard appealed the Administrator's suspension order to the National Transportation Safety Board. On April 28, 1988, a hearing was held before an administrative law judge of the National Transportation Safety Board. There, the law judge issued an Oral Initial Decision and Order (App C) affirming the FAA Administrator's Order of Suspension. In her order the law judge found that, irrespective of the fact that Board rules (49 C.F.R. § 821.32) and the provisions of the Administrative Procedures Act (5 U.S.C. § 556) place the *'burden of proof'* upon the FAA Administrator, once an incident is established "we have to find that there is negligence or carelessness involved" unless convincing evidence to the contrary is brought forth by the accused (App C).[9] The law judge further concluded that Captain Pritchard's choice of taxiways had been careless.[10]

On June 9, 1988, Captain Pritchard perfected an appeal to the full National Transportation Safety Board by the filing of an appeal brief in accordance with Board rule 821.48(a) (49 C.F.R. § 821.48(a)). In an order adopted by the Board on November 1, 1989 (App. B), the full National Transportation Safety Board reversed the law judge's conclusion that Pritchard's choice of taxiways had been careless, nonetheless the Board affirmed the law judge's Oral Initial Decision and Order. Rather than following its own prior precedent with regard to the

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9 *Administrator v. Hibbard* (1 NTSB 1152, 1154 (1971)).

10 In its Opinion and Order (App B; EA-3024), the full NTSB reversed the law judge's conclusion that Pritchard's choice of taxiways had been careless.

use of the inference of pilot carelessness,[11] and with regard to the conduct which the Board otherwise deems to be in violation of the cited regulation,[12] the Board instead concluded that Captain Pritchard had been careless for not operating his aircraft as safely as it might have been (App B; EA-3024) based upon the inference of carelessness drawn from the end result.[13] The Board ignored the FAA's failure to reasonably investigate its charge of carelessness, in accordance with the provisions of the statute and its own policies, beyond simply establishing that an incident had occurred.

Pritchard subsequently appealed his case to the U.S. Court of Appeals for the Ninth Circuit.[14]

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11 *Administrator v. Davis and Manecke*, 1 NTSB 1514 (1971).

12 In *Administrator v. Eger* (2 NTSB 862, 863 (1974)), the Board concluded that carelessness is conduct which demonstrates a "general lack of care". The law judge in this case found that Captain Pritchard had been generally careful, before, during and after his attempted turn (App C).

13 Both the Board and the courts have previously held that "a pilot's responsibility must be defined with sufficient specificity in order to hold him culpable for a regulatory violation" (*Pike v. Civil Aeronautics Board* 303 F.2d. 353, 357 (CA 8, 1962), also; *Administrator v. Coleman*, 1 NTSB 229; *Administrator v. Babbit*, 1 NTSB 1305 (1971); *Administrator v. Hart*, 2 NTSB 1110 (1974)).

14 After initially having dismissed Pritchard's case as untimely, the Court of Appeals ultimately reviewed Pritchard's case when the Court reversed the dismissal and remanded the case for further consideration (112 LEd. 2d 560; 111a SCt. 552 (1990)).

Without a hearing, on July 15, 1992, the Court of Appeals issued a Memorandum which affirmed the Board's Opinion and Order in the case (App A). The Appeals Court did not discuss the central *Due Process* issue concerning the FAA Administrator's failure to investigate the circumstances of the taxiway incident before inferring Pritchard's carelessness.[15] And the Court failed to address the Board's inconsistencies with regard to its standards for alleged pilot carelessness.

In examining the Board's use of *inference*, the Court of Appeals improperly compared the inference of pilot carelessness drawn by the FAA Administrator to a *'state of mind'* presumption of criminal intent in a murder case involving the use of a deadly weapon (App. A, citing; Dickey v. Lewis, 859 F.2d. 1365, 1369 (9th Cir. 1988)). Further, the Court of Appeals improperly compared Captain Pritchard's *'Due Process'* argument, with regard to his lack of a proper opportunity to present "convincing proof" to overcome an inference of carelessness, with a case where a judgment on the pleadings had been granted after a pilot was imprisoned for drug trafficking and after the imprisoned drug trafficker had failed to deny the central charges cited in an FAA Suspension Order

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15 Both the provisions of the Federal Aviation Act (49 U.S.C. § 1429(a)) (App G) and the Administrator's own policies require a complete and impartial investigation of all the facts and circumstances surrounding an incident before an airman's certificate may be suspended. The FAA Administrator admitted his failure to investigate the taxiway deficiency at any point, even when Pritchard submitted the issue for investigation before the hearing (14 C.F.R. § 13.1).

(App. A, citing; *Kolek v. Engen*, 869 F.2d. 1281, 1288 (9th Cir. 1989)). Both the Board (NTSB) and the Court of Appeals acted without regard to the safety concerns which Congress had intended in its grant of powers, and without regard to both Captain Pritchard's rights and the limitations placed on the FAA Administrator's exercise of his powers.

REASONS FOR GRANTING THE WRIT

As a threshold matter, at the time of the incident the facts show that Captain Pritchard was a professional airline pilot who relied on his pilot certificate for his livelihood. Thus, "it is clear that [Captain Pritchard] had a property interest in his license sufficient to invoke the protection of the *Due Process* Clause." (*Barry v. Barchi*, 443 U.S. 55, 64 (1978)). And Captain Pritchard maintains an equally important interest in his 'good name and reputation' (*Board of Regents v. Roth*, 408 U.S. 564, 573, and note 12 (1972); *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974)).

Here, the Court of Appeals departed from a very basic rule of administrative law in affirming the Board's (NTSB) Order. Where, in *Accardi v. Shaughnessy* (347 U.S. 260, 265 (1954)), the Court set a standard whereby a federal agency may not depart from the rules and policies which it has established for the protection of an individual's rights, the Court of Appeals allowed just such a departure from agency policies. A regulatory violation was concluded without investigation when both the underlying statute[16] and the FAA

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16 The Federal Aviation Act (49 U.S.C. § 1429(a): App. G) grants the FAA Administrator the power to suspend a pilot certificate if, after *investigation*, the Administrator determines safety demands it.

Administrator's own policies required a complete, fair, and impartial investigation of the facts and involved circumstances. A complete investigation would have concluded the near impossibility of the turn Pritchard attempted, and the necessity for a warning to Pritchard in order for the turn to have been safely accomplished, just as Pritchard's own investigator and expert concluded.[17] However, the investigating FAA inspector admitted his failure to investigate the cited incident beyond establishing the undisputed fact that the incident had occurred.

The Court of Appeals further erred in equating an inference of pilot carelessness to the presumption of criminal intent in a murder using a deadly weapon (App. A, citing; *Dickey v. Lewis* supra 1369 (9th Cir. 1988).[18] Such standard was accomplished contrary to the Court's direction in *Lincoln v. French* 105 U.S. 614 (1881)) and the evolving case law with respect to presumption and inference, as well as without regard to the Board's own procedures as were properly established in *Administrator v. Davis and Manecke* (1 NTSB 1514,

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17 Pritchard's expert extensively discussed the difficulties of the turn during his testimony at the hearing and further clarified the problems Pritchard faced in a declaration included in the Excerpts of Record submitted to the Appeals Court.

18 Significant among the many differences between the two applications is that the *intent to kill* is a state of mind issue which necessarily requires the establishment of a presumption or inference drawn from the circumstances. It is a violation of the Court's prior direction when carelessness is presumed irrespective of the facts (*Maggio v. Zeitz*, 333 U.S. 56, 66 (1948)).

1520 (1972)).

"It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." (*McFarland v. American Sugar*, 241 U.S. 79, 86 (1916)).[19] However, in Captain Pritchard's case, the FAA's inference of carelessness was arbitrary when there was an utter lack of investigation concerning the cause of the taxiway incident. The FAA Administrator was allowed to entirely ignore his statutory responsibility to investigate both to determine involved circumstances and to protect safety in air commerce with regard to the operation of the involved airport.[20]

In allowing the inference of pilot *carelessness* to stand, without investigation, both the Board and

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19 Where Captain Pritchard had received no notice or warning concerning the hazard he faced, precedent holds that both the FAA and the airport operator were liable (Cf. *Peavey v. City of Miami*, 1 So 2d. 614, 617 (Fla. 1941): *Mills v. Orcas Power & Light*, 355 P.2d. 781, 784 (Wa. 1960)).

20 The provisions of the Federal Aviation Act (49 U.S.C. § 1432(b)) provides for the Administrator to set minimum safety standards for the issuance of Airport Operating Certificates. Although the Kansas City International Airport admittedly did not meet these standards (App B; EA-3024), the FAA Administrator ignored investigation of the dimensional taxiway deficiency. The Appeals Court did not address the issue of the FAA Administrator's investigative responsibilities prior to issuance of his suspension order.

the Appeals Court affirmed an inherent *abuse of discretion* and the violation of Captain Pritchard's *Due Process* right. Neither the Board nor the Appeals Court concluded pilot carelessness in line with the standards for carelessness which the Board had previously established (*Administrator v. Eger*, 2 NTSB 862, 863 (1974)). Where the law judge found that Captain Pritchard had been generally careful, he could not also have been found to have demonstrated "a general lack of care" (*Eger*, supra).

I. THE FAA ADMINISTRATOR IMPERMISSIBLY ISSUED AN ORDER OF SUSPENSION WITHOUT INVESTIGATION.

While the provisions of the Federal Aviation Act (49 U.S.C. § 1429(a)) grant the Administrator the power to suspend an airman's certificate, Congress predicated this authority on the prior conduct of an investigation (App. G). Although it might be reasonably argued that Congress allowed the FAA Administrator the discretionary authority to undertake his investigations in whatever manner, and to whatever extent, he deems appropriate, the FAA Administrator cannot reasonably ignore his own investigative policies and standards (*Service v. Dulles*, 354 U.S. 363, 388 (1957)). It is a violation of the *Due Process* rights granted under the terms of the 5th and 14th Amendments to the Constitution.

In looking at this case from the simple standpoint of policy and precedent, the FAA Administrator is precluded from drawing inferences of pilot carelessness without meeting both the standards set forth by the Board (NTSB) for review (*Administrator v. Davis and Manecke*, supra, 1154), and those established by the courts for the use of presumptions and inferences (*Maggio v. Zeitz*, 333 U.S. 56, 66 (1948)). Both standards require

investigation to reasonably rule out causes other than negligence or pilot *carelessness*. In Captain Pritchard's case, however, the FAA Administrator met none of these standards. The incident was simply established and the investigation went no further. Captain Pritchard's *Due Process* rights were violated, and his pilot certificate was suspended contrary to established policy and precedent.

Neither the Board's Order nor the Appeals Court's affirmation made any attempt to justify the FAA Administrator's failure to meet his own investigative standards in concluding *pilot error* without investigating beyond the fact that an aircraft incident had occurred. Instead, the Board affirmed the FAA Order on the basis of its conclusion that the end result had been less safe than it might have been (App B). The Appeals Court then improperly justified its own affirmation based upon reasoning surrounding the use of *'state of mind'* presumptions concluded in a murder case where the perpetrator had used a deadly weapon (App A, citing; *Dickey v. Lewis*, 859 F.2d. 1365, (9th Cir. 1988)). The comparison was inappropriate. In this case, the need for the inference was not necessitated by a lack of evidence with regard to intent. Evidence and expertise was available, yet ignored.

Both the Board and the Appeals Court further ignored the law judge's findings that Captain Pritchard had been generally careful throughout the course of his turn (App. C), and the law judge's conclusion that **"if Captain Pritchard had to go off that pavement, he did it in as safe a manner as could be done"** (App. C). Yet, by the Board's definition and the most common understanding, *carelessness* is "a general lack of care" (*Eger*,

supra). A *'general lack of care'* was never shown, and the FAA Administrator's failure to investigate demonstrated that his order was issued without jurisdiction and without fulfillment of his *Due Process* responsibilities. It created unnecessary conflict and allowed a hazard to continue. There was an admitted taxiway dimensional shortfall in violation of FAA safety standards which had not even been considered in the FAA's presumption of pilot carelessness.

In Captain Pritchard's case, hard facts were readily available for investigation but they were completely ignored under the latitudes allowed in the Board's *Lindstam Doctrine* (supra). Consequently, the FAA Administrator elected to do nothing more than establish the undisputed fact than an incident had occurred. However, the Board itself had previously precluded the use of inferences under these same circumstances (*Administrator v. Hibbard*, 1 NTSB 1152, 1154 (1971)). The change here had an extremely prejudicial and detrimental affect on Captain Pritchard's defense. The principles of presumption and inference were never intended to relieve a federal agency of its investigative responsibilities. It is a breach of both the FAA Administrator's statutory duty and Pritchard's *'Due Process'* right under both the law and applicable agency policy (App. F).

In *United States v. Heffner* (420 F.2d. 809 (1970)), the Court of Appeals for the Fourth Circuit cited the Court's *Accardi Doctrine* (supra) in reversing a tax fraud case. The Fourth Circuit noted that in both *Accardi* (supra) and *Yellin v. United States* (374 U.S. 109 (1963)) the Court "vacated government actions and remanded for new determinations consistent with the established procedures even though the Court doubted that these procedures would lead to a

different result" (*Heffner*, supra at 813). The FAA Administrator's investigative policies required that the investigating FAA inspector undertake "an unbiased gathering of all facts" (App. F). The FAA Administrator further directed that "[t]he object of the investigation is to obtain that evidence necessary to establish whether a violation occurred" (App. F). Yet the investigating FAA inspector in this case admitted that he did nothing more than establish that an incident had occurred. He did nothing to establish the circumstances associated with the incident or his presumption of pilot carelessness. This is contrary to the standards which the Courts have otherwise established in the public's interests.

The failure to investigate was a breach of the FAA Administrator's *'Due Process'* responsibilities under the terms of both the Federal Aviation Act (supra) and the FAA Administrator's own policies. The FAA's failure to investigate leaves an important public safety issue unresolved. Under the circumstances of this case, the Administrator improperly issued his Suspension Order without fulfilling the statutory prerequisite for the exercise of the power Congress granted, and both the Board and the Court of Appeals improperly affirmed that Suspension Order. Pritchard "should at least have the chance given him by the regulations" (*Yellin v. United States*, supra at 121). Thus, the Court's *Accardi* Doctrine should govern. And the FAA Administrator should be required to follow the policies which he has established in fulfillment of both his safety responsibilities and his *Due Process* obligations.

II. THE COURT OF APPEALS IMPROPERLY EQUATED THE BOARD'S PRESUMPTION OF CARELESSNESS, REACHED HERE WITHOUT INVESTIGATION, TO INFERENCES OF INTENT DRAWN FROM THE CIRCUMSTANCES.

The Board's order, and the Appeals Court's affirmation, undertook a significant departure from the accepted and usual course of judicial proceedings. Where the principles of *presumption* and *inference* have long been accepted as methods to determine the probable truth of a matter, the Board now concludes its determinations based upon *possibilities* instead of *probabilities,* and requires that these *possibilities* be established as true unless overcome with *convincing* evidence.[21] According to the law judge, and as affirmed by the Board, a finding of pilot carelessness was required in any case where there was not *convincing proof* of impossibility (App. C and B).

In its Memorandum, the Appeals Court took this tangential reasoning a step further by improperly equating the inference of pilot carelessness, drawn from the fact that a taxiway turning maneuver ended in a result less safe than it might have been, to a murder in which intent may be presumed by establishing the fact that a deadly weapon was used in its commission. The Appeals Court first ignored the *Due Process* requirement for a complete, precise, and unbiased investigation by the FAA before taking its action,[22] then, the

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21 *Administrator v. Hibbard*, supra. (Cf. *Universal Camera v. NLRB*, 340 U.S. 474, at 490 and 497 (1950)).

22 49 U.S.C. § 1429(a), and FAA Order 2150.3, paragraph 203(b). (APP. F).

Appeals Court ignored the mandatory nature of the Board's inference of carelessness in violation of a long line of contrary Court rulings[23] and in violation of the intent which Congress expressed in its most recent amendments to Rule 301 of the Federal Rules of Evidence.[24]

The Appeals Court erroneously compared the situation surrounding the Kansas City taxiway incident, where evidence was readily available for investigation and evaluation, to inferences involving *state of mind* determinations where only the circumstances are reasonably available for evaluation (Citing; *Dickey* (supra)). Where a federal administrative agency has both a statutory and *Due Process* policy requirement for a complete and unbiased investigation of all the facts surrounding an incident, the Appeals Court was wrong to allow an inference to stand when there was admittedly no investigation beyond establishing that an incident occurred, especially when Pritchard made repeated attempts to have the matter properly investigated.

In affirming the FAA Administrator's Order of Suspension, both the Board and the Appeals Court relied on the testimony of Captain Pritchard's

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23 *Lincoln v. French*, 105 U.S. 614, 617 (1881); *Illinois Central Railroad v. I.C.C.*, 206 U.S. 441, 465 (1907); *McFarland v. American Sugar*, 241 U.S. 79, 86 (1916); *Western and Atlantic Railway Co. v. Henderson*, 279 U.S. 639 (1929); *Maggio v. Zeitz*, 333 U.S. 56, 66 (1948); *Steadman v. S.E.C.*, 450 U.S. 91, 98 (1981).

24 House Report No. 93-1597; Notes of Conference Committee.

expert who concluded that Pritchard's aircraft *could have* accomplished its turn safely under some circumstances. The FAA ground controller said he'd seen another aircraft accomplish the turn, and the airport operations manager stated that he'd never seen another aircraft fail to negotiate the turn which Captain Pritchard attempted. The FAA investigation did not evaluate the admitted taxiway deficiency or its ultimate affect on the incident about which the FAA Administrator took his action. Thus, the burden of going forward at the hearing shifted to Captain Pritchard when all of the experts on FAA policy, procedure, and design standards were not available for Pritchard's examination due to the FAA's failure to investigate or evaluate prior to taking its action against him.[25]

Ultimately, the fact that Pritchard's expert concluded that the safe completion of the taxiway turn was not impossible led the Board to its improper and erroneous extrapolated view that Pritchard's "witness acknowledged there was no reason why the turn could not have been made safely" (App. B). With respect to the circumstances present, the uncontested testimony in the case

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25 The FAA and the Department of Transportation have established policies whereby its employees are precluded from providing expert testimony outside the agency except when such experts have not been relied upon in reaching its determinations. Thus, when the FAA failed to investigate the taxiway incident, Pritchard had no one within the FAA to call as a witness to provide testimony concerning the safety impact of the taxiway design deficiency or its affect on the incident. FAA testimony simply relied on non expert opinions that the aircraft should have stayed on the taxiway.

demonstrated that the route Captain Pritchard selected was only used due to the closure of the normal routing by a construction project. Further, no information was available on the aircraft which was claimed to have successfully negotiated the turn or the procedures which were utilized. However, even the FAA's investigating inspector concluded that the fact the airport was FAA certificated was sufficient cause for a pilot to believe that it met all FAA standards and could be used normally.[26] Thus, when the points relied upon for establishment of the inference of carelessness had been overcome by uncontroverted evidence, the Board was left to fall back on its basic view that the inference carelessness could not be overcome without proof of impossibility, irrespective of the FAA's failure to investigate. Even the case compared by the Appeals Court did not support this view.

Prior to Captain Pritchard's case, the standard for pilot carelessness established by the Board had been one in which the facts demonstrated "a general lack of care" (*Eger*, supra). The Court of Appeals had thus concluded that the

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26 On appeal, both the Board and the Appeals Court referenced the non expert testimony of the airport operations manager alluding to his impression that the type of taxiway lines painted at the intersection provided information on the difficulty which might be expected in attempting a turn. However, as was provided to the Board in FAA documentation accompanying Pritchard's appeal, and to the Appeals Court in Pritchard Excerpts of Record (5-7), the taxiway lines provide no such information. Pritchard never had an opportunity to challenge the non expert conclusion utilized by the Board in support of its inference.

purpose of the cited regulation was to prohibit a pilot from engaging in "inherently dangerous practices" (*Haines v. Department of Transportation*, 449 F.2d. 1073, 1076 (CA D.C. 1971)), or practices which demonstrate "a gross disregard for safety" (*Ferguson v. National Transportation Safety Board*, 678 F.2d. 821, 829 (9th Cir. 1982)). All of this was entirely consistent with the growing body of law on the responsibilities of the various aviation entities, specifically the established responsibilities of airports to assure that their facilities are safe for use (*Peavey v. City of Miami*, 1 So.2d. 614, 617 (Fla, 1941); *Mills v. Orcas Power and Light*, 355 P.2d. 781, 784 (Wash, 1960)).

The Board affirmed the suspension order, and the FAA's conclusion of carelessness, based on the fact that Captain Pritchard's turn *could have* been accomplished. The reasoning used by the Board in its ratification of the inference of carelessness was that if the turn *could have been* accomplished safely, it *should have been* accomplished safely. Without investigation or further evidence concerning the degree to which the taxiway design shortfall was a factor, this logical chasm perverts the original intent and purposes of the legal principles of presumption and inference, and violated the Board's own evidentiary standards.[27] Carelessness must be presumed irrespective of the conclusions of the trier of fact that Captain Pritchard had been careful before, during, and after his attempted turn, and irrespective of the fact that he fulfilled all of his various responsibilities.[28]

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27 *Administrator v. Davis and Manecke*, 1 NTSB 1514, 1520 (1972).

28 *Pike v. Civil Aeronautics Board*, supra, 357.

In comparing the present case to *Dickey* (supra), the Appeals Court departed from the accepted standards for presumption and inference and forgot the standards which the Court has long applied. "Rules of evidence as to inferences from facts are to aid reason, not to override it. And there does not appear to be any reason for allowing any such presumption to override reason." (*Maggio v. Zeitz*, 333 U.S. 56, 66 (1948)).

DISCUSSION

The two elements which Captain Pritchard raises here in his petition have been central to his case, and to his appeals, from the very beginning. However, the Board and the Appeals Court essentially ignored both the *Due Process* issue and the FAA Administrator's tangential shift away from the central tenets of *presumption* and *inference*, which have been well established over the years, to something more akin to a mandatory presumption of pilot careless after any aircraft accident or incident.

The public's interests and the interests of justice are ill served by principles which allow a federal administrative agency to ignore meaningful investigation and expert analysis in favor of suspicion and surmise. The evidentiary principles of presumption and inference were never intended as a substitute for factual investigation. Instead, the principles arose out of a need where facts could not be readily examined. Here, the only reason that the facts and circumstances were not completely examined and evaluated was that the Board's *Lindstam Doctrine* (supra) no longer demands it. The FAA Administrator has been free to ignore the standards for presumption and inference which the Board itself has established (*Administrator v. Davis*

and Manecke, supra), when an inference of pilot carelessness must not only be overcome with convincing evidence, but when the only suitable evidence is evidence of impossibility.

While the question of whether on not inferences may be promulgated without investigation remains an open issue, it is well established that federal administrative agencies have a *Due Process* obligation to fulfill the requirements of their own regulations and policies (*Accardi*, supra). Although the statute is unclear as to the degree to which it required the FAA Administrator to investigate before taking his action against Captain Pritchard, the FAA Administrator's policies are clear that his investigations are to be a complete and unbiased gathering of all facts, including those which tend to undermine any allegation of carelessness by Captain Pritchard. Where the record shows that Captain Pritchard attempted to seek the FAA's complete, impartial, and unbiased investigation of the admitted taxiway design deficiency, and the impact it had on the incident about which the FAA Administrator complained, the FAA Administrator could not simply rest on the inference of pilot carelessness based upon the undisputed fact of the result.

CONCLUSION

Pritchard's Petition for a writ of certiorari should be granted. Where the underlying statute withheld authority for the FAA Administrator to issue a Suspension Order until the completion of an investigation, such investigation must at least meet both the FAA Administrator's own policy standards and those investigative standards which the Board (NTSB) has specified for the use of presumption and

inference. The standard which the Board has espoused in requiring presumptions of careless, in spite of the admitted lack of investigation, is arbitrary. Thus, the Memorandum of the Court of Appeals affirming the Board's Order should be vacated. And the case should be remanded to the Court of Appeals for further proceedings in light of the Court's direction in both *Maggio v. Zeitz* and *Accardi v. Shaughnessy*.

Respectfully submitted,

November 30, 1992

JOHN C. PRITCHARD
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(310) 305-2837

PETITIONER PRO SE

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. PRITCHARD,	No. 90-70041
Petitioner,	NTSB No. EA-3024
v.	MEMO*
NATIONAL TRANSPORTATION SAFETY BOARD,	FILED JUL 15 1992
Respondent,	

Petition for Review of an Order of the National Transportation Safety Board

Submitted July 6, 1992**
Pasadena, California

Before: FARRIS, WIGGINS, and FERNANDEZ, Circuit Judges.

John Pritchard petitions pro se for review of the National Transportation Safety Board's order affirming an administrative law judge's determination that he operated an aircraft in a

careless or reckless manner so as to endanger the life or property of another, in violation of 14 C.F.R. Section 91.9 (now codified at 14 C.F.R. Section 91.13). We affirm.

Pursuant to 49 C.F.R. Section 821.37, "[d]ue regard shall be given to the convenience of the parties with respect to the place of the hearing." Pritchard resided in Texas. Although he indicated that his witnesses were "based" in California, he failed to specify in both his motion to change venue and to bifurcate where the witnesses actually resided. The FAA Administrator's witnesses resided in Kansas. Under section 821.37, the administrative law judge was required to give due regard to the convenience of both parties. The Board's conclusion that this requirement was satisfied is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Section 706(2)(A).

Summary judgment was precluded by the FAA Administrator's responses to Pritchard's Requests for Admission. See Fed. R. Civ. P. 56(c) (summary judgment appropriate if no "genuine issue as to any material fact"). The Administrator disputed, for example whether a Lockheed 1011 could safely proceed through the intersection between Bravo and Bravo-10 and whether Pritchard should have discerned the intersections deficiencies, if any. The administrative law judge could properly consider the Administrator's responses; although a matter is admitted under Fed. R. Civ. Pr. 36(a) if an answer or objection is not served within thirty days, the rule allow the court to lengthen the period and, in any event, is "instructive rather than controlling" in Board proceedings. 49 C.F.R. Section 821.19(c).

The Board also did not abuse its discretion in affirming the administrative law judge's determination that Pritchard operated an aircraft in a careless or reckless manner. Pritchard's expert witness testified that the turn could have been made safely. A ground controller testified that another Lockheed 1011 had successfully proceeded through the intersection at night. And, the airport operations manager testified that no other aircraft had taxied off the intersection since the airport opened in October, 1972. The sharp angle of the turn and the lack of centerlines indicated that the turn required particular attention and care. We understand Pritchard's argument, but, even if he could not discern the intersection's narrow fillet radius, the Board could properly conclude that the turn should have been accomplished without incident.

Pritchard's due process arguments also fail. Pritchard received adequate notice of the proceeding and "ample opportunity to contest the charges brought and the sanction imposed against him." Kolek v. Engen, 869 F.2d 1281, 1288 (9th Cir. 1989) (FAA enforcement proceedings). Both the administrative law judge and the Board fully considered the arguments raised in Pritchard's motions to change venue and to bifurcate. The Lindstam Doctrine did not impermissibly shift the burden of establishing that Prichard had operated an aircraft in a careless or reckless manner. Cf. Dickey v. Lewis, 859 F.2d 1365, 1369 (9th Cir. 1988) (mandatory presumption in criminal proceeding). We have carefully reviewed the record. There was no deprivation without adequate procedural protections. See Kolek, 869 F.2d at 1288.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument.

APPENDIX B

SERVED: November 24, 1989

NTSB Order No. EA-3024

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

JAMES B. BUSEY, Administrator, Federal Aviation Administration, Complainant,	)	DOCKET SE-8665
v.	)	
JOHN C. PRITCHARD, Respondent.	)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision and order issued by Administrative Law Judge Joyce Capps on April 28, 1988 at the conclusion of an evidentiary hearing. 1/ The law judge found carelessness in respondent's operation

of an L-1011 commercial aircraft after landing at Kansas City International Airport on January 19, 1986. While taxiing the aircraft to the gate, respondent allowed the right main landing gear to leave the taxiway, enter the mud and strike a taxiway light. Applying the facts presented at the hearing which were "not contested at all," the law judge found that respondent was careless in: 1) his choice of taxiway egress;[2/] and 2) not making the turn "as safely as it could have been."

Respondent has filed a "brief" (75 pages plus 5 pages of errata) which challenges the law judge's ruling on two preliminary motions and also raises these two arguments: 1) the first officer shared responsibility for the incident by failing to "keep watch" on his side of the aircraft during the turn; 2) the airport operator and/or ground control failed to warn respondent that the taxiway he selected did not meet FAA Airport Design Standards for his category aircraft. [3/]

We find no reversible error in the law judge's rulings on respondent's preliminary motions to change venue or bifurcate hearing. Respondent had filed his motions because he and most of his witnesses were "based" in (or closer to) Los Angeles than Kansas City, the proposed venue. However, in response, the Administrator noted, inter alia, the following: all of his (the Administrator's) witnesses lived in Kansas City; respondent actually resided in Texas, not California; respondent failed to identify where his witnesses actually resided, (as opposed to where they were "based"); respondent waited 5 months after receiving notice of the Administrator's preference for Kansas City before registering his opposition. Section 821.37(a) of the Board's Rules mandates that, "due regard shall be given to the convenience of the parties with respect

to the place of the hearing." 49 C.F.R. Section 821. That venue in Kansas City may have resulted in greater financial burden to respondent, does not necessarily mean that respondent was not given his "due regard." From the argument offered by the Administrator in opposition to the motion, notably the absence of specific residences for respondent's witnesses, it is clear that the law judge had a reasonable basis on which to rule.

Respondent's appeal of the law judge's decision not to grant summary judgment also fails. Several issues of material fact were in dispute at the time of the hearing, including respondent's central argument concerning the taxiway design. We do not see how the law judge could have decided the case without first resolving these questions of fact.

Respondent next seeks to exculpate himself by raising the shared responsibility of his first officer for the incident. We are not convinced. Because of the design of the L-1011 (taxi controls accessible only in the left seat, better visibility in the right seat), respondent maintains that he had to rely on the first officer to "keep watch" on the right-side of the aircraft. To accomplish the 135 degree turn attempted by respondent, this contention may in fact be true. However, respondent presented scant evidence on his actual direction to the first officer. Respondent testified only that the first officer's duty was "a general" one and that he was briefed on respondent's intentions. 4/ Furthermore, it is unclear from the testimony of respondent's expert just how much better the first officer's view really was. [See Tr. at 158-60.] We distinguish respondent's "reliance" on his first officer in this case from that in Coleman and Thomas, two cases where we have held that a captain can rely upon the first officer's oral characterization of a radio

transmission. Administrator v. Coleman, 1 NTSB 289 (1968) and Administrator v. Thomas, 3 NTSB 349 (1977). Not only as pilot-in-command but as the pilot operating the aircraft, it was respondent's duty to require clearing assistance from his crew, ground control or ground guides. The responsibility for the consequences of respondent's failure to do so rests solely with him.

We do not find established, however, the alleged "imprudence" of respondent in passing up 90 degree turns for one requiring a 135 degree turn. That there were other more accommodating egresses available, or that B-10 was designed for other traffic, do not alone mean that respondent's decision was unsafe or even "imprudent." Rather, it was respondent's lack of care in accomplishing the turn which mandates affirmation of the Administrator's order. It is on this basis that we reject respondent's central argument concerning deviations from FAA taxiway dimension criteria. Testimony from respondent's expert witness makes plain that respondent could have easily ascertained the alleged deficiency in the taxiway dimensions and thereby apprehend just how difficult the turn would be. Moreover, the obtuseness of the angle (135 degrees) and the absence of taxiway centerlines were readily apparent; both of these, too, should have alerted respondent of the need to exercise additional care in making the turn.

Respondent's witness acknowledged there was no reason why the turn could not have been made safely. The ATC ground controller also testified that he had observed another L-1011 safely make the turn at night. The weather was clear and the taxiway surface was apparently dry. We can find in the record no evidence that would either tend to exculpate respondent or vitiate the inference of

carelessness made by the Administrator. Therefore, we affirm the law judge's initial decision and order.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision and the order of suspension are affirmed.

KOLSTAD, Acting Chairman, BURNETT, LAUBER, NALL and DICKINSON, Members of the Board, concurred in the above opinion and order.

1/ An excerpt from the hearing transcript containing the initial decision is attached.

2/ Respondent landed on runway 27 and exited on C-7 high speed taxiway. Ground control instructed respondent to "taxi to ramp;" the most direct route to his destination; however, was taxiway D-6, which was temporarily closed. Respondent elected to take taxiway B and turned on Taxiway B-10, a turn of 135 degrees. B-10, designed for traffic landing on runway 09, also did not have a centerline.

3/ FAA Advisory Circular 150/5 300-12 sets out minimum dimensions for taxiway width, edge safety margin, fillet configuration, shoulder width and safety area width. Respondent contends that the fillet should have been 75 feet and was actually 25 feet, and that the 15-foot edge margin was not maintained for his category aircraft; the FAA concedes the latter.

4/ Law Judge Capps:

"What did you say to the first officer? You said you discussed it. Tell me about the discussion.

Respondent:

...We briefed the fact that 1 was going to enter...utilizing Bravo 10.... Now, to the exact verbance that was used and to what extent that transpired, ...I can't say exactly what happened. But that was a general." [Tr. 127]

APPENDIX C

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

Office of Law Judges

T. Allan McArtor, Administrator, Federal Aviation Administration, Complainant,	)	
v.	)	DOCKET
JOHN C. PRITCHARD, Respondent.	)	SE-8665

Courtroom 6
Sixth Floor
415 East 12th Street
Kansas City, Missouri

Thursday
April 28, 1988

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 o'clock a.m.

BEFORE: HON. JOYCE CAPPS
Administrative Law Judge

ORAL INITIAL DECISION AND ORDER

JOYCE CAPPS, Administrative Law Judge:

This proceeding comes before the National Transportation Safety Board pursuant to the provisions of Section 609 of the Federal Aviation Act of 1958, as amended, on the appeal of John C. Pritchard, respondent herein, to the order of suspension with waiver of penalty dated September 16, 1987 suspending his airman's certificate 1983580, including his airline transport pilot privileges, for a period of 30 days due to his alleged violation of Section 91.9 of the Federal Aviation Regulations. The factual basis for the Administrator's complaint is that the respondent, which taxiing his aircraft, allowed the right gear to go off the runway and become imbedded in mud.

After due notice to the parties, this matter came on for trial in Kansas City, Missouri, on April 28, 1988, at which time the Administrator was represented by Barbara Boyle Esquire. The respondent was represented by Mr. Kevin W. Daisey who is employed by Hawaiian Airlines. Mr. Daisey is not an attorney, but I do wish to state that not being an attorney was hardly noticeable because he did a very fine job today in both his direct examination in his case in chief and in his cross examination. I will add, also, that one of the witnesses for the respondent also played some role in representing the respondent, and that was Mr. Robert C. Konop who is also employed by Hawaiian

Airlines.

The facts of this case are very, very simple, and have not been contested at all. On January 19, 1986, Captain Pritchard was the pilot in command of a Lockheed 1011 which, at the time, was designated as a Total Air Flight 116 from Lambert Field, St. Louis, Missouri to Kansas City International Airport. After landing on Runway 27 at KCI, the respondent taxied down to turn off Charlie 7 and just as he passed D-6 turn off, he contracted the tower and made it known that the wanted to go to Gate 30 which happens to be located in the terminal building B. He was given clearance to proceed directly to his gate without any further instruction being requested or given.

The manner of getting to Gate 30 form the respondent's position was left up to the captain. It should also be stated that the captain was sitting in the left seat and was the only person on the aircraft who could taxi to the aircraft because the tiller wheel is located only to the left seat pilot's position. He proceeded taxiing on Taxiway Charlie and then made a right turn and proceeded in a northerly direction on Taxiway Bravo. In order to get to Gate 30, the respondent normally would go to Gate 30 by using D-6. However there was a NOTAM out on this date that D-6 was closed due to construction and repairs. So that is why he proceeded on to Taxiway Bravo.

After turning on to Taxiway Bravo there is a 90 degree turn off onto Taxiway D if he would have elected to use that which would have taken him to Gate 30. He did not elect to do that. He proceeded north on Bravo and came to Bravo 11, which was also a 90 degree turn that would have taken him to Gate 30. The respondent testified that from past

experience of having used B-11, he didn't want to do that on this occasion because it involved two very sharp turns. That is why he consciously taxied past the B-11 turn off and went to the B-10 turn off intending to make a very sharp right turn and go to Gate 30 from B-10. The turn from Taxiway Bravo to Bravo 10 is a 135 degree turn.

In the process of making the turn onto B-10, the right gear of the aircraft, the entire right gear of the aircraft left the taxiway and became deeply imbedded in [a] muddy, grassy area. I think after that occurred what Captain Pritchard did was very prudent and cautious. When he did find his aircraft imbedded in mud, he immediately stopped and waited for assistance which did come and the aircraft was safely and efficiently removed by a tractor and towed to the ramp area.

There were 141 passengers on board the aircraft and I think something like 12 or 15 attendants or stewards and then we had three men in the cockpit. There was no damage done to the aircraft, nor was any injury sustained by anyone. The only bit of damage at all was a taxiway light that was damaged.

This case, in my opinion, fits under the Lindstam Doctrine. In that, once the government establishes a certain incident and there is no forthcoming evidence to explain how that incident occurred, we have to find that there is negligence or carelessness involved. That is what was done here. The Administrator put on evidence that there was no mechanical problem with the airplane, itself. There was no weather problem involved because it was a beautiful day. There was no traffic problem in that this occurred on a Sunday about noon, and at that particular time there was very light traffic that

was being worked by the tower.

The respondent's defense in this case seems to be twofold. One, that his first officer, who had a better view from the right side of the aircraft, did not do what he should have done to help the pilot in command avoid what occurred here. I don't know exactly what that first officer was supposed to do, but whatever it was, he didn't do it according to the respondent. And No. 2, that the airport itself is not properly designed to accommodate 1011 aircraft. I don't buy either one of these defenses.

The respondent's own expert witness, Mr. Konop, stated in his testimony that the width of the main gear is 36 feet, that both taxiway Bravo and Bravo 10 are 75 feet wide. He also stated that bearing those measurements in mind, and the maximum radius capabilities of the 1011, that turn from Taxiway Bravo onto B-10 could have been accomplished and the aircraft remain on the pavement.

There are taxiway center marking for turning off Taxiway Bravo onto B-11 and beyond the B-10 up to B-9. They are both 90 degree turns. And both of them or either of them could have been used to get to Gate 30. However, there is no taxiway marking from Bravo onto B-10 from a northerly direction down to a southeasterly direction which B-10 runs. That does not mean that an aircraft is prohibited from making that turn. As Mr. David Napoli testified, it's just not a recommended turn. Mr. David Napoli is the Airport Operations Manager at KCI. Before that he was the Assistant Operations Manager and all together has been at KCI for 11 years. KCI began operating in October of 1972 and a review of the records and from Mr. Napoli's own knowledge in the past 11 years, there has never,

since the opening of the airport, been a taxiway excursion from the pavement on B-10 -- never. That suggests to me that either no pilot has ever made that turn from Taxiway Bravo onto B-10 or else they have made the turn and they have made it safely. I would think it was probably the former because I can't imagine why anybody would want to make that turn. I mean, why put yourself through that aggravation when there were one, two, three other 90 degree turns that could have been made. I would much rather make a 90 degree turn than I would a 135 degree turn any day of the week.

I think that there was carelessness on the part of Captain Pritchard in first, completely ignoring other, safer, avenues of exodus from Taxiway Bravo and secondly, after determined to do that, not making the turn as safely as it could have been made according to his own expert.

Captain Pritchard is not the first pilot who has ever gone off the pavement and he won't be the last. But, usually those are just due to momentary carelessness on the part of the pilot in command. This case differs from some others I have heard in that there was no damage to the aircraft. I think that is phenomenal here because usually there is some sort of damage at least to the strut. At least a collapse of the gear itself. But there wasn't even a gear collapse here. So, if Captain Pritchard had to go off that pavement, he did it in as safe a manner as could be done. he must have been going very slowly or otherwise I'm sure we would have had a gear collapse here. I think that he proper sanction in a situation like this with all of the circumstances; namely, that there was no damage whatsoever except to that little landing light -- and it was just one little old landing light -- and there were no personal injuries, that a 20 day suspension is

warranted. Of course, in this case, since there was a timely filing of the NASA report, no time will actually be served. It is, therefore,

ORDERED that the Administrator has established by a preponderance of the evidence the violation of 91.9 and the order of suspension with waiver of penalty is hereby modified to reflect a sanction of 20 days, provided however, that no period of sanction shall actually be served in view of the timely filing of a NASA report.

Entered this 28th day of April, 1988, in Kansas City Missouri.

Joyce Capps
Judge

Edited on June 3, 1988

APPENDIX D

U.S. Department of Transportation
Federal Aviation Administration

Central Region

Iowa, Kansas, Missouri, Nebraska

601 E. 12th Street
Kansas City, Missouri 64104

In Reply Refer To: ACE-7
86CE630012

Area Code: 816 374-5446

CERTIFIED

September 16, 1987

TO: John C. Pritchard
842 South Highway 46
New Braunfels, TX 78130

ORDER OF SUSPENSION

It appears to the Administrator of the Federal Aviation Administration, acting by and through his Regional Counsel, on the basis of all information available, that:

1) At all times hereinafter mentioned, you were, and presently are, the holder of Airline Transport Pilot Certificate Number 1983580.

2) On January 19, 1986, you acted as pilot-in-command of Civil Aircraft N702TT, a Lockheed 1011-385-1, desingated as Total Air Flight 116, on a

flight from Lamber Field, St. Louis, Missouri, to Kansas City International Airport (MCI), Kansas City, Missouri.

3) After landing on Runway 27, at MCI, N702TT was cleared to taxi to the ramp. While taxiing Flight 116, you allowed the aircraft's right main gear to leave the taxiway, enter the mud, and struck a taxiway light.

4) By reason of the foregoing facts and circumstances, you operated an aircraft in a careless manner, so as to endanger the life and property of others, in violation of Section 91.9 of the Federal Aviation Regulations.

By reason of your violation of the Federal Aviation Regulations, the Administrator has determined that safety in air commerce and the public interest require the suspension of your airline transport pilot certificate.

NOW, THEREFORE, IT IS ORDERED, pursuant to Section 609 of the Federal Aviation Act of 1958, as amended, that your Airline Transport Pilot Certificate Number 1983580 be suspended effective October 11, 1987, and said suspension to continue in force for a period of thirty (30) days thereafter. In the event you fail to surrender your certificate to this office on or before October 11, 1987, said suspension shall continue in effect until thirty (30) days subsequent to your actual surrender thereof.

KENNETH E. GEIER
Regional Counsel

By:

BARBARA BOYLE
Attorney

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. PRITCHARD	) FILED
	) SEP 14, 1992
Petitioner,	)
	) CA No. 90-70041
vs.	)
	) NTSB No.
NATIONAL TRANSPORTATION SAFETY BOARD,	) EA-3024
	)
	) ORDER
Respondent.	)

Before: FARRIS, WIGGINS, and FERNANDEZ, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX F

FAA ORDER 2150.3

COMPLIANCE AND ENFORCEMENT PROGRAM

The following are excerpts from the FAA's Compliance and Enforcement Program Manual, FAA Order 2150.3 which was in effect, on January 19, 1986, at the time of the incident described within the FAA Administrator's Order of Suspension and the Board's (NTSB) Order affirming that certificate suspension. These excerpts are also contained within Addenda attached to Pritchard's 1/18/92 Reply Brief submitted to the Court of Appeals for the Ninth Circuit. Those portions of particular importance are highlighted or underlined.

CHAPTER 1.

INTRODUCTION

1. PURPOSE.

This order describes the authority, responsibilities, policies, guidelines, procedures, objectives, and legal aspects of the Federal Aviation Administration Compliance and Enforcement Program.

CHAPTER 2.

ENFORCEMENT OBJECTIVES AND POLICY

200. PURPOSE.

The purpose of this chapter is to set forth the policies and objectives of the Federal Aviation Administration as established by this order and by policy statements or directives issued by the

Administrator.

201. GENERAL.

The FAA is charged with the responsibility to assure that the highest possible degree of safety in air transportation and air commerce is maintained. To achieve this, the agency first must establish regulatory standards and requirements.

a. Once the regulations are in effect, to assure effective implementation *the agency must provide for the education and guidance needed by the industry and the public*. The importance of this step, and the related personal and organizations skills needed, cannot be overemphasized. *In the absence of thorough understanding, compliance with safety regulations cannot be achieved*.

b. Finally, the agency has a statutory obligation to assure compliance with all regulations. This obligation is especially critical as it applies to the holders of FAA certificates. Individual inspectors, managers, and attorneys must clearly understand the crucial role they play in achieving compliance. However, providing guidance and training to industry, as crucial as that role is, must be kept in proper perspective. Once a certificate or an amendment involving that certificate is issued, the holder (individual, operator, manufacturer, supplier, etc.) must be held responsible for compliance. This may best be looked on as a total enforcement concept. As an example, the responsible field office should respond as forcefully, through investigation, reporting, and follow-up, to an *airport certificate holder who fails to comply* with firefighting equipment requirements, as another field office will respond to an aircraft manufacturer's use of materials that do not

conform to specifications in a type design; or still another field office will respond to the operation of an aircraft over congested areas below minimum safe altitudes. The Administrator's enforcement policy does not vary by internal agency discipline. Each certification and operating rule is important in achieving overall safety objectives. The FAA enforcement program described in this handbook is equally applicable to all activities regulated by the agency, including programs which may have traditionally used different methods of obtaining compliance. When violations occur, whether they involved the operations of an airport, the production of aircraft, the performance of aircraft maintenance, or the operation of aircraft, *FAA personnel* responsible for enforcing those regulations *shall investigate*, report, and process such matters for appropriate enforcement action *consistent with this order*.

203. ENFORCEMENT PROGRAM.

The objectives of the enforcement program as set forth in Order 1000.9C, Enforcement Policy, are achieved through surveillance and detection, *investigation*, and enforcement processing.

a. **Surveillance and Detection**. An essential part of the enforcement program is that violations and potential violations be discovered at the earliest possible time. In any situation where inspectors identify a potential violation, they should act to prevent it. . . . *Any agency employee who becomes aware of apparent violations shall report such violations to responsible agency elements and shall cooperate with subsequent investigations*. . . .

b. **Investigation**. Prompt action is essential to assure a fair enforcement program. *Unnecessary*

delays in the investigation cannot be tolerated. Every effort must be made to expeditiously investigate and report violations. The responsibility to act promptly rests equally upon the inspector investigating the incident as well as the regional and Washington offices responsible for enforcement action. Delays in processing violation reports weaken the effectiveness of the agency's enforcement program in several ways. First, such delays may permit an unsafe condition to prevail if prompt corrective action is not taken. Secondly, delays tend to deemphasize the seriousness of a given violation. In this manner, prolonged delays tend to strengthen the violator's case. By the same token, if the alleged violator is innocent, any unwarranted delay in processing the case may impose an unjustified hardship. In order that enforcement actions be objective and fair, *there must [be] an unbiased gathering of all facts, precise investigation,* and accurate and prompt reporting. A violation report without all of the facts only leads to delays and thus, the objective of fair enforcement is lost. Such reports can also mislead reviewing authorities and result in embarrassment for the agency. Poor investigation weakens the effectiveness of the enforcement program. *It is important that the investigation be planned and conducted in a manner consistent with the complexities involved. . . . As part of the investigation, all special and mitigating circumstances associated with the violations, as well as information which tends to undermine an allegation , should be contained in the report*.. An inspector who is not attentive to special mitigating circumstances may only provoke resentment, making it more difficult to obtain compliance and cooperation in the future from all parties, including witnesses. See Chapter 4 for guidance in planning and conducting investigations.

CHAPTER 4.

INVESTIGATION OF VIOLATIONS

400. PURPOSE.

The purpose of this chapter is to furnish the inspector with general guidelines to assist in the investigation of matters within the inspector's assigned jurisdiction. The guidelines are not all inclusive and are not meant as a substitute for common sense and good judgment. The type of investigation to be planned and conducted will vary with the type of violation involved. The inspector may find it useful to review agency Order 1600.20A which contains more complete guidance on investigative techniques, conduct of interviews, collection and preservation of evidence, and preparation of reports.

401. PLANNING AND INITIATING THE INVESTIGATION.

b. Before initiating an investigation, it is imperative that an inspector carefully consider the circumstances of the allegation and the nature of the violation, and develop an investigative plan of action accordingly. As the investigation progresses, the plan should be reevaluated continually and revised as necessary based on the new facts and circumstances. In developing such a plan, the inspector should carry out early and close coordination with supervisors, legal counsel, and supporting offices, and consider the following:

(7) Continually reevaluate the plan to *assure the investigation will establish who did or did not do what*, where, when, why and how.

404. EVIDENCE OF VIOLATIONS.

a. *The object of the investigation is to obtain that evidence necessary to establish whether a violation occurred. Evidence includes all the means by which any alleged fact*, the truth of which is submitted to investigation, *is established or disproven*. It is the means by which we prove or establish the facts set forth in FAA legal notices. If there is doubt as to the relevance of a particular piece of evidence, it should be secured and preserved from the outset.

b. Evidence may be obtained from any place or source where it is legally available. An investigation at the scene of a violation will often assist the inspector in the collection and analysis of evidence. There is no substitute for the inspector's personal observation, which should be placed in writing as soon as possible. *The inspector must not only accurately obtain the facts and circumstances, but must prepare a report which clearly conveys such facts and circumstances.*

APPENDIX G

STATUTES AND REGULATIONS

FEDERAL AVIATION ACT -

Section 609(a) (49 U.S.C. Section 1429(a)):

"The Secretary of Transportation* may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other *investigation* made by the Secretary of Transportation, he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificates), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation for his proposed action and, except in cases of emergency, shall provide the holder of such

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* Section 6(c) of the Department of Transportation Act (Public Law 89 - 670; 80 Stat. 931) transferred all functions, powers and duties of the Federal Aviation Administration to the Secretary of Transportation. The change substituted the words "Secretary of Transportation" for references to the Administrator of the Federal Aviation Administration.

certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation under this section may appeal the Secretary of Transportation's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Secretary of Transportation. The filing of an appeal with the Board shall stay the effectiveness of the Secretary of Transportation's order unless the Secretary of Transportation advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of sections 1006, and the Secretary of Transportation shall be made a party to such proceedings."

Section 1006(a) (49 U.S.C. Section 1486(a)):

"Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person

disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

Section 1006(f) (49 U.S.C. Section 1486(f)):

"The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Secretary of Transportation shall be subject only to review by the Supreme Court upon certification or certiorari as provided in section 1254 of title 28, United States Code."

FEDERAL AVIATION REGULATIONS -

Section 13.1 (14 C.F.R. Section 13.1)

"(a) Any person who knows of a violation of the Federal Aviation Act of 1958, the Hazardous Materials Transportation Act relating to the transportation or shipment by air of hazardous materials, or the Airport and Airway Development Act of 1970, or of any regulation or order issued under those acts should report it to appropriate personnel of any FAA regional or district office."

"(b) *Each report made under this section*, together with any other information the FAA may have that is relevant to the matter reported, *will be reviewed* by FAA personnel t*o determine the nature and type of any additional investigation* or enforcement action *the FAA will take*."

Section 91.9 (14 C.F.R. Section 91.9)
(Now codified at 14 C.F.R. Section 91.13(a) -

"No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS -

Section 821.32 (49 C.F.R. Section 821.32)

"In proceedings under section 609 of the Act, the burden of proof shall be upon the Administrator."